STATE OF SOUTH CAROLINA) COUNTY OF RICHLAND)	BEFORE THE CHIEF PROCUREMENT OFFICER
In re: Contract Controversy of) New Venue Technologies, Inc.)) *Claimant*,)) vs.)) State of South Carolina)) *Respondent* .))	**NEW VENUE TECHNOLOGIES, INC.'S PRET-TRIAL BRIEF AND MOTIONS**

Claimant, New Venue Technologies, Inc., ("NVTI") by and through its undersigned counsel, submits this pretrial brief and motions pursuant to the scheduling order of the CPO, in regard to its contract controversy claims as against the State of South Carolina, (including its governmental subdivisions and its Public Procurement Units)(hereinafter, collectively and individually the "State"), as follows:

FACTS

This controversy concerns a contract solicited and awarded under the South Carolina Consolidated Procurement Code. The Chief Procurement Officer or his impartial designee has exclusive jurisdiction over the claims alleged herein pursuant to S.C. Code Ann. § 11-35-4230.[1]

[1] The CPO does not have jurisdiction over claims which NVTI may have that are not in the nature of contract, including but not limited to tort claims as against individuals and state entities, and claims under federal statutes, including but not limited to federal claims which pre-empt state laws.

On August 5, 2010, the Information Technology Management Office issued Solicitation No. 5400001873, as amended.

NVTI was a proposer who submitted a response to Solicitation No. 5400001873 ("solicitation"). NVTI was issued an "Intent to Award" with respect to the Contract.

The Statement of Intent to Award issued and posted by the State on December 21, 2010 states that it "becomes the final Statement of Award effective 08:00:00, January 4, 2011", and that "the final statement of award serves as acceptance of [NVTI's] offer."

Pursuant to this Statement of Award, the Contract was to commence on February 15, 2011, and was to continue until and including February 14, 2016.

The start date of February 15, 2011 was a result of the State pushing back the start date from earlier discussed and promised start dates in December 2010 and early January 2011.

Per the Solicitation, the documents that constitute the contract at issue (hereinafter "Contract") include the Record of Negotiations, documents regarding clarification of the offer under procurement authorities, the Solicitation, as amended, modifications to New Venue's offer, if any were accepted by the Chief Procurement Officer, the NVTI offer, the notice of award and purchase orders. The Solicitation provided that any document signed or otherwise agreed to by the persons other than the Procurement Officer shall be void and of no effect.

The Solicitation, and thus, the Contract, provided that "It is the State’s intent to solicit responses for a Software Acquisition Manager (SAM) to maintain a real-time web-based vendor hosted system for use by all Public Procurement Units. The SAM can be defined as a software acquisition manager acting as an order fulfillment, distribution, and tracking system designed to monitor software licenses, license transfers, license redistribution, software

maintenance and renewals, and warranty transactions as well as invoicing and payment from acquisition to end of life cycle."

The Solicitation, and thus, the Contract, further provided that "The South Carolina Information Technology Management Office (ITMO) is soliciting proposals for a state term contract for the fulfillment and tracking of software licenses and maintenance purchases, warranty information, license and maintenance expiration dates, and support services purchase and expiration dates. Since no funds have been appropriated for this project, a self-funded system is required (see Section III., Budget). **It is the intent of the State to have participating Public Procurement Units submit all software purchase orders through the SAM**."

The Solicitation, and thus the Contract, also provided that **"The State intends to award a state term contract to one Offeror for use by all State Agencies**."

Under the Contract awarded to NVTI, to commence on February 15, 2011, all participating Public Procurement Units and all State Agencies were required to submit all software purchase orders through the SAM. As to each such order and purchase of software, NVTI, as contractor, was entitled to "retain a fee (a percentage of the total invoice less returns & taxes) that will be charged to the software provider (LAR, VAR, etc.). The fee will then be deducted from that software provider's invoice prior to SAM's payment to software provider. 1% will be submitted to the State as an administrative fee. For example, if the SAM fee is 3% then 2% remains with the SAM and 1% is submitted to ITMO as an administrative fee." In the case of NVTI's proposal, under this contract, NVTI was entitled to retain a SAM fee of 2.5% of all software purchased by the State of South Carolina and its Public Procurement Units from February 15, 2011 until expiration of the contract on February 14, 2016.

The Solicitation did not provide for any Public Procurement Unit to be excluded from the SAM. Public Procurement Units subject to the SAM, and thus the requirements of the Contract, include but are not limited to two hundred seven state agencies, public entities and political subdivisions of the state such as DHEC, The Citadel, Charleston County School Districts, DSIT, University of South Carolina, South Carolina State University, and others.

The State has acknowledged and agreed that orders and purchases of Citrix, Corel, IBM Middleware, Microsoft, Microsoft EES, Oracle, and Symantec software, among others, were to be included as a part of the contract at issue. However, no software orders or purchases were excluded by the Contract, and thus, all software orders and purchases from February 15, 2011 until February 14, 2016 were to be subject to the 2.5 percent fee to be paid to NVTI. Under the Contract, NVTI, as contractor, was entitled to "retain a fee" equaling 2.5 percent of the total of each such invoice less returns & taxes, as to all software purchases by the State of South Carolina and all of its agencies and subdivisions.

Well into the Contract term, the State acknowledged in writing that NVTI's web solution was "ready and has been fully tested" that it "was excellently designed" and that New Venue "exceeded our expectations." Further, the State acknowledged in writing that "delays on our (the State's) end" was the reason that the system delivered by NVTI was "not fully implemented yet."

Due to the acts and omissions of the State, each of which constitute significant, material and ongoing breach of the Contract, the State failed and refused to permit and require all software orders and purchases to be submitted to the SAM so that NVTI could receive its 2.5% fee.

In fact, starting February 15, 2011, the State and its agencies, subdivisions and Public Procurement Units submitted no purchases to the SAM for more than seven months, in violation of the Contract. This breach of Contract by the State deprived NVTI of significant and substantial revenue that NVTI relied on and needed to perform under the Contract. NVTI notified the State of this ongoing breach repeatedly and asked the State to conform to the Contract repeatedly, to no avail.

Moreover, after seven months into the Contract term, the State and its agencies, subdivisions and Public Procurement Units thereafter submitted only a limited number of all software orders and purchases to the SAM, in ongoing violation of the Contract. This ongoing and persistent breach of Contract by the State deprived NVTI of significant and substantial revenue that NVTI relied on and needed to perform under the Contract. NVTI notified the State of this ongoing and persistent breach repeatedly and asked the State to conform to the Contract repeatedly, to no avail.

As a consequence of its failure and refusal to implement and require all software orders and purchases to be submitted to the SAM, throughout the entire term of the contract, the State has been in breach of the Contract from the first day of the Contract until the last day of the Contract, on October 8, 2013, the date on which the State wrongfully, and in breach of its Contract, terminated the Contract, purportedly "for cause" but without justification.

Under the Contract, the State agreed it took responsibility for working with all current state term contract holders ("Vendors"), as to software, to make any changes needed to the contracts of the Vendors to work with the SAM.

The State also had agreed that it would "make every effort" to work with manufacturers/vendors to help them understand the processes associated with the Contract.

In the Contract, the State clearly specified that it was not outsourcing software purchasing, but that "the contract was limited to the tracking of license purchases, renewals, etc."

In the Contract, the State also expressly agreed that "Neither party is an employee, agent, partner, or joint venturer of the other."

In the Contract, the State specifically stated that its intent was not to invite the contractor to take over the complete software procurement process, but was rather "simply for the installation of a software solution to manage the software purchase process itself."

By its actions in breach of the Contract, the State deprived NVTI of significant revenue needed for NVTI to successfully perform its Contract with the State, and thus the State, despite NVTI's best efforts, set NVTI up to fail. Even despite such ongoing misconduct by the State, NVTI admirably continued to perform all expressly stated, material aspects of its Contract. In doing so, NVTI incurred significant damages and losses, for which the State is liable.

These damages include, but are not limited to: lost revenue equaling 2.5% of the total dollar amount of all purchases of software by all State agencies and by all Public Procurement Units which were to participate in the SAM commencing and from February 15, 2011 until close of business on February 14, 2016; the total the costs of analysts, developers and testers to build the solution to meet the State's requests; the costs of training, staffing and paying a help desk team; the costs of graphic design for marketing material required by the Contract; the costs of engaging support to assist in designing and building the online training tutorial under the Contract; the costs of all hardware, software, equipment, space, materials, supplies and personnel necessary for the implementation of the Contract that NVTI was awarded; the cost of disaster recovery systems required for performance of the Contract, among others.

The State further breached its Contract with NVTI, after commencement thereof, by imposing and attempting to impose on NVTI new conditions, not contained in or a part of the parties' Contract, as a pre-condition for the State to perform its own contractual obligations, in violation of NVTI's rights under the Contract. NVTI incurred damages, losses and harm as a consequence of attempting to comply with these extra-contractual demands of the State. Despite the fact that the State's numerous and onerous demands were over and above the requirements of NVTI's Contract with the State, NVTI continued to attempt to meet these excessive demands, at great expense, cost and damage to NVTI.

Among other violations by the State of NVTI's rights under the Contract, software Vendors were never required by the State to provide NVTI with software Licenses/KeyIDs; NVTI was forced by the State to implement additional functionally within the MySAM Central application that was not was not a part of the Contract or the original system requirements; NVTI was forced by the State to undergo creditworthiness and financial approval processes by software Vendors at the insistence of software Vendors and such Vendor approvals were never a part of the Contract requirements; the State informed NVTI only after the Contract commenced that a substantial line of credit (not specified or required by the Contract, was required by the State as a precondition to implementation of the Contract; as a result of the State's extra-contractual line of credit requirement, NVTI was required to, and did, seek financing from numerous sources to satisfy the State's extra-contractual demands; from January 2011 through August 2011, NVTI (at its own expense) traveled, in good faith, throughout the State of South Carolina to perform "demos" for agencies for a contract that the State was unreasonably refusing to implement, in violation of the Contract and NVTI's rights.

NVTI wrote to the State notification, warning that the State's ongoing and numerous breaches were causing NVTI serious harm, placing NVTI at risk of financial ruin. NVTI stated "However, due to the non-cooperative Vendors, we are unable to service these customers, which means we are still making $0 for this contract even though our solution is in place and is ready to be implemented."

NVTI further notified the State in writing that "In good faith, we have spent (and continue to spend) the money to build and maintain our solution due to the fact that we were awarded a contract by the State of South Carolina - promising us the opportunity to earn revenue beginning February 15, 2011. It is now May and we have yet to make our first dollar. All the while our expenses are climbing."

NVTI sent yet another such notice to the State as June 2011 approached, when the State continued in its extraordinary non-performance and breach. Again, NVTI warned the State that it continued to incur costs and losses, without any of the revenue to which it was entitled under the Contract.

The State thereafter further breached its Contract with NVTI by sending NVTI a "Show Cause Letter" dated January 28, 2013, and a demand letter, dated September 30, 2013, when in fact the State itself was in breach, had been in breach, and persistently remained in material breach of its contractual obligations to NVTI from the beginning of the Contract, continuously, throughout.

The State further breached its Contract with NVTI on or about August 26, 2013 when it improperly issued "Contract Modification #1" in violation of NVTI's Contract rights, and improperly proceeded to modify its own actions, rights and obligations and NVTI's rights obligations from those set forth under the parties' Contract.

As alleged herein, during the term of the Contract, the State wrongfully, and in breach of its Contract, made excessive and costly extra-contractual demands of NVTI as a pre-condition to the State's own performance of its existing obligations under the Contract.

The State's excessive, extra-contractual demands of NVTI and the extensive damages already caused to NVTI by the State's ongoing and enduring breaches of Contract as alleged herein, culminated in extreme and aggressive misconduct by the State as against NVTI, amounting to (among other things) further breach of Contract by the State, and a violation of the State's obligation of good faith and fair dealing. This misconduct includes but is not limited to the State's initiation of an unfounded Contract Controversy as against New Venue, which contained numerous false and unsupported accusations, and which was only at length withdrawn; large non-consensual chargebacks of funds from bank accounts of NVTI; threats by the State to involve criminal authorities against NVTI; unfounded and spurious accusations of criminal wrongdoing on the part of NVTI by the State; the assertion of unfounded criminal charges as against NVTI made by the State and its employees and agents, which resulted in NVTI's principal being unlawfully detained, incarcerated and falsely imprisoned; the institution of unfounded and baseless debarment and suspension proceedings as against NVTI; and the wrongful termination of NVTI's contract. NVTI has suffered contract damages (in addition to other damages to be redressed separately, in other fora having jurisdiction thereof) as a result of these extreme actions on the part of the State.

LAW CONCERNING CLAIMS BY NEW VENUE AND ON CONTRACT CONTROVERSY

In addition to simple law of contracts, damages and South Carolina procurement law, the well-defined, explicit and clearly applicable governing rules of South Carolina law provide that courts will not re-write the written contract of the parties. *See Gambrell v. Travelers Ins. Cos.*, 280 S.C. 69, 310 S.E.2d 814 (1983). A party to a contract may not unilaterally modify the contract between the parties. *See Layman v State of S.C.,* 368 S.C. 631 (2006). An amendment to a contract must be mutually agreed upon and must be supported by valid consideration. *Evatt v Campbell*, 234 S.C. 1 (1959); *Poole v. Incentives Unlimited, Inc.,* 338 S.C. 271

It also is not a breach of contract for a party to do precisely what the contract expressly permits. *Williams v Riedman*, 339 S.C. 251, 529 S.E. 2d 28 (S.C. App. 2000). Indeed, the written contract governs the rights and duties of the parties. As a result, the evidence will show that the State / ITMO were in material breach of contract from the outset of this contract, that the State/ITMO wrongfully demanded compliance with requirements that were not a part of the contract, as an umlawful precondition of performance by the State and ITMO and that as a consequence, New Venue sustained serious losses that could not be overcome. Further, the State and ITMO have actually asserted wrongdoing on the part of New Venue for doing exactly as the contract provided, and also, for taking steps to comply with the improper ad unlawful extra-contractual preconditions that the State and ITMO set for their own performance of the contract.

New Venue denies all allegations of the Counterclaim late submitted by the State/ITMO and demands strict proof thereof. New Venue specifically reserves, and does not waive, any and all motions, defenses, denials and avoidances as to the Counterclaims.

DAMAGES CLAIMED AND REMEDIES SOUGHT

NVTI seeks, and is entitled to, an award of all damages resulting from the State's numerous breaches of Contract asserted herein; an award of all costs and losses caused to NVTI by the State as a result of the State's misconduct, wrongdoing and breaches described herein.

NVTI seeks an accounting of all orders and purchases by the State (including all of its agencies) of software from February 15, 2011 until the date of the hearing, and an award to NVTI of 2.5% of the total amount of all such purchases, (less the minimal amounts NVTI has been already paid for any such purchases); and an Order that the State must pay to NVTI, monthly, 2.5% of all orders and purchases software by the State and all of its agencies from the date of the hearing on this matter until February 14, 2016.

NVTI also seeks an accounting of all orders and purchases of software by the State's Public Procurement Units that participated in the SAM from February 15, 2011 until the date of the hearing, and an award to NVTI of 2.5% of the total amount of all such purchases, (less the minimal amounts NVTI has been already paid for any such purchases); and an Order that the State must pay to NVTI, monthly, 2.5% of all orders and purchases software by the said Public Procurement Units from the date of the hearing on this matter until February 14, 2016.

NVTI further asks for an award of damages for such amounts, as well as damages for the state's unlawful breach of the contract in the manners stated herein, the costs and damages flowing therefrom, future, lost profits as a result of the improper termination of the contract, attorneys' fees and costs, as well as all remedies available in this matter and such other and further relief as the CPO deems appropriate.

By asserting the Claims and Request for Resolution herein NVTI and its principals do not waive, but expressly reserves all claims at law and in equity, for all state tort law claims and for all federal law claims available as against the State and others acting wrongfully in concert therewith.

THERE ARE NO KNOWN SPECIAL ISSUES OR MOTIONS REGARDING WITNESSES OR EVIDENCE EXCEPT AS BELOW.

OTHER ISSUES AND MOTIONS:

1. STATE/ITMO DID NOT MEET THE DEADLINE OF THE SCHEDULING ORDER TO EXCHANGE EXHIBITS.

The State/ITMO failed to meet the deadline of the scheduling order for exchange of exhibits. As a consequence, **New Venue moves herewith** that all state offered exhibits that were not exchanged timely must be excluded on objection of New Venue.

2. STATE / ITMO FAILED TO MARK AND COPY AND EXCHANGE EXHIBITS REQUESTED AND IDENTIFIED BY NEW VENUE.

On several occasions, including on April 30, 2014 which was copied to counsel for the CPO Ms. DeJames, New Venue notified the State/ITMO that it desired certain exhibits identified by New Venue, which were exclusively in the control and possession of the State/ITMO, be marked and exchanged as exhibits. These exhibits were among the exhibits that the CPO, by his scheduling order, specifically identified as documents from which exhibits might be drawn. New Venue made proper request for these records, which are public records,

but they were not marked or exchanged. The policies of the Procurement Office are clear that records are to be provided promptly when they are relevant to an ongoing CPO hearing. Further, it is entirely improper for the State and ITMO to withhold these documents and only offer to permit their inspection upon payment of exorbitant "ransom." New Venue properly identified the exhibits, and the State/ITMO must be required to include them in the record.

The State and ITMO also improperly delayed in production of certain other records until after the deadline for New Venue to offer Exhibits. Accordingly, **New Venue herewith moves** that should be free to add such records, as it desires, to the list of exhibits during the hearing. Finally, the state/ITMO have improperly claimed "privilege" to certain records, and have refused to prepare a proper log of such records so that the privilege may be tested and challenged. The CPO must demand that the state forthwith produce a proper log. Finally, the CPO should order that any prviilege as been waived in regard to records constituting or relating to the purported "audit" that all parties and the CPO were told to await in order for this hearing to be set.

When the State/ITMO provided Exhibits, there was no audit, and so counsel to New Venue asked you for a copy. Counsel to the State/ITMO replied as follows:

"As to your question regarding the Audit Report. The report has not been released. It is work product and protected by that privilege. As such it is also exempt from disclosure under FOIA."

The State/ITMO have indicated that they intend call one or more witnesses to testify about its “audit,” and that they consider the “audit” to be as an “expert’s report” - not admissible. However, if it is not admissible, that does not by law make it a record that is exempt from FOIA. Established state law makes it clear that this matter should have been and

must be produced.

Naturally, once the State intends to testify about the "audit," the "audit" is no longer privileged, if it were privileged to begin with. *See Floyd v. Floyd*, 365 S.C. 56 (S.C. App. 2005). *See also S.C. State Highway Dept v. Booker*, 260 S.C. 245 (1973)(The Federal case of *United States v. 23-76 Acres of Land*, 32 F.R.D. 593 (D. Md., 1963) has squarely faced these issues. In what has been called a "well-reasoned decision", the Court attacked the various defenses that have arisen in pre-trial discovery procedures. *Pre-Trial Discovery in Condemnation Proceedings: An Evaluation*, 42 St. John's L. Rev., 52, 60 (1967). The Court dismissed the attorney-client and the work product defenses, noting that by its basic nature expert opinion was subjective and thus there was no basis to believe that the information sought, though critically relevant to the main issue in the case, could be obtained in any manner other than disclosure. With respect to the unfairness defense, the Court concluded that the sole issue in any condemnation case must be the question of just compensation, and, in determining this question, experts must be employed because the property owner is usually ignorant of the value of his own land. The Court stated: "Where value is the basic, if not sole, issue in litigation, it is not unfair for either party to know in advance of trial what the other party intends to prove, what opinions his opponent's experts hold, the method by which those opinions were formulated, and the facts upon which they are based. *Id*. at 597.") **New Venue herewith moves** for an order requiring the State/ITMO to produce the "audit" and related documents.

APPOINTMENT OF IMPARTIAL HEARING OFFICER

NVTI is entitled by the South Carolina Constitution to an impartial hearing officer in the first instance. It is not a sufficient response to such demand that the failure to appoint an

impartial and disinterested hearing officer can be "cured" on appeal - New Venue would waste needless and unrecoverable expense, time and effort in trying a case to an involved and interested hearing officer. New Venue has asked that the CPO appoint a proper, disinterested and impartial hearing officer to set a prompt hearing; to Order that the State promptly comply with the various lawful Freedom of Information Law requests that have been submitted to the State by or on behalf of NVTI; to afford NVTI all Due Process rights reserved to it by law; to hear and decide this matter promptly; and to grant to NVTI all relief requested herein, and all relief otherwise permitted by law. This case is a contract controversy and it arises under S.C. Code Ann. § 11-35-4230. As such, this case is an administrative action. Mr. Spicer must recuse himself as hearing officer, and New Venue so requests in this case.

Article 1, Section 22 of the South Carolina Constitution provides that:

> SECTION 22. Procedure before administrative agencies; judicial review.
>
> No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review.

South Carolina law has clearly addressed the requirement of impartiality in administrative hearings. That law comes from Article 1 Section 22 of the South Carolina Constitution and *Garris v. The Governing Board of the State Reinsurance Facility*, 333 S.C. 432; 511 S.E.2d 48 (S. Ct. 1998), interpreting the same. *Garris* states that a hearing conducted before a quasi-judicial official is partial if, through involvement with the case, the hearing official may have developed a "will to win." The *Garris* Court states that the purpose of Article

1, Section 22 of the South Carolina Constitution is to protect citizens against partial hearings before administrative bodies.

New Venue has alleged that in December 2010 it was awarded a multi-year contract to manage all software purchases by the State of South Carolina and its agencies, and that the State significantly delayed, and failed to honor, its contract obligation to purchase all software through New Venue.

New Venue's contract was to be managed by the Information Technology Management Office of the Budget and Control Board (hereinafter ITMO). After several delays, a start date for this contract was set for February 15th, 2011. New Venue alleges that it spent considerable resources completing development of its software solution, hiring staff to manage the contract, and training procurement officers in the use of New Venue's software solution for managing the purchase of software. New Venue's contract was to be self-funded through a small percent of each software order placed by the State and its agencies.

New Venue alleges that its contract was negotiated under the direct supervision of Mr. Spicer by his subordinate, Debbie Lemmon of ITMO. The testimony will show that at every decision point in New Venue's contract negotiations, Mrs. Lemmon referred to Mr. Spicer for approval and made it known that authority to approve details resided in Mr. Spicer. On one occasion Mrs. Lemmon shared Mr. Spicer's hand written notes on the points of negotiation. The final contract reflected Mr. Spicer's notes. New Venue alleges, and documents show, that Mr. Spicer had some involvement in the delays by the state's ITMO as alleged by New Venue. Ultimately, disputes arose regarding the contract.

On September 30, 2013, ITMO filed with the Chief Procurement Officer ("CPO") a Request for Resolution under the Consolidated Procurement Code, seeking termination of New

Venue's contract to manage all software purchases for the State of South Carolina. This Request for Resolution (hereinafter ITMO's Contract Controversy) was given case number 2014-205. ITMO's Request for Resolution claimed, among other things, that the software developed by New Venue and used by the State for years did not exist, that New Venue had committed fraudulent acts, and that New Venue was in breach of contract because of financial difficulties and missed payments to vendors.

Mr. Spicer, the very person who led negotiations for ITMO, took jurisdiction over hearing ITMO's contract controversy as the hearing officer. New Venue filed a motion to recuse Respondent Spicer as the hearing officer on October 30, 2013 in case number 2014-205. ITMO withdrew its Contract Controversy against New Venue on November 7, 2013. [2] New Venue did not make a motion to recuse Mr. Spicer in this case until the date this pretrial brief is filed, as set forth below. Hence, there has been no ruling or decision on such matter in this case. Further, any decision to deny such motion is interlocutory and not appealable until a decision on the merits of the matter has been issued.

On October 10, 2013, Mr. Spicer also issued a notice of a separate administrative action against New Venue regarding possible "debarment" of New Venue. In that document, Mr. Spicer specifically stated that the proceeding was being held "based on the breach of contract by New Venue." This statement by Mr. Spicer in official communication specifically disqualifies Mr. Spicer under Article 1, Section 22 of the South Carolina Constitution. Whether any party breached the contract is an issue that remains to be decided by the CPO -- or by his

[2] Even though the ITMO case in which the motion to recuse had been dismissed for months, Respondent Spicer ruled on that Motion to Recuse on January 14th, 2014 and placed his ruling in case number 2014-206, a contract controversy case not even filed by New Venue until after the withdrawal of ITMO's Contract Controversy in case number 2014-205. Although the ruling was not on a motion made by NVTI in this action, the Order renders it unnecessary for NVTI to make a motion to recuse, inasmuch as the law does not require a futile act.

designee as requested by New Venue, and as permitted by the statute governing such controversies, S.C. Code Ann. § 11-35-4230.

Following the withdrawal of ITMO's contract controversy, New Venue filed this contract controversy against ITMO for breach of contract on November 14th, 2013, which was assigned case number 2014-206. Documents show that Mr. Spicer is a necessary witness in regards to ITMO's contract with New Venue, the creation of the contract, and the delays alleged by New Venue as part of its claims, and any claims of breach.

Here, it is clear that by proceeding forward as the Hearing Officer, Mr. Spicer would be ruling on allegations of his own failures and shortcomings in his lead role in negotiation and implementation of the contract between ITMO and New Venue. Few things can be more convincing of partiality and development of a "will to win" than the alternative to winning being to rule oneself as having failed and having cost one's own department millions of dollars in losses as a result.

Furthermore, Mr. Spicer is a potentially a key witness in the dispute before him because of his lead role in negotiation and implementation. Mr. Spicer has already stated that his presiding over this proceeding would make it impossible for New Venue to call him as a witness. Inability to call Mr. Spicer denies New Venue access to a key witness regarding contractual intent and allegations regarding ITMO's failure to implement and failure to perform ITMO's duties prescribed by the contract with New Venue. The intentional and knowing denial of access to a key witness at the hearing further violates New Venue's procedural due process rights prescribed in Article 1, Section 22 of the South Carolina Constitution.

READY TO PROCEED

New Venue is ready to proceed before an impartial hearing officer on the date set for the hearing on the merits of this matter.

RESPECTFULLY SUBMITTED,

Schmidt & Copeland LLC

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April __, 2014